

In re) Fair Hearing No. 9900
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Appeal of)

The petitioner appeals the decision by the Department of Social Welfare denying him an increased "spousal allocation" from his wife's applied income from Medicaid effective October 1, 1989, instead of as of May, 1990, which the Department granted. The issue is whether the Department is bound by the effective date of federal statutory changes to this aspect of the Medicaid program.

In lieu of oral testimony the parties have submitted the following Stipulation of Facts:

1. The Medicare Catastrophic Coverage Act of 1988 (MCCA) (P.L. 100-360, July 1, 1988) and § 6411(e)(3) of the Omnibus Budget Reconciliation Act of 1989 OBRA - 89) (December 9, 1989) amended the Medicaid statute to provide greater protection of income for the monthly maintenance needs of the community spouse of a nursing home resident as of September 30, 1989. 42 U.S.C. § 1396r-5(d).
2. On October 1, 1989, the Department of Social Welfare (DSW) implemented this provision by establishing a standard allocation plus an excess shelter allowance for the maintenance needs of the community spouse. M § 413.21; P-2420(D)(8) & P-2435(J).
3. [Petitioners], are a married couple. As of October 1, 1989, Mrs. [Petitioner] resided at the Birchwood Terrace Health Care Center as a Medicaid participant and Mr. [Petitioner] resided in the community.

4. In a letter dated November, 1989, DSW Commissioner Celani sought to notify all nursing home residents participating in Medicaid that this applied income deduction became effective on October 1, 1989 and that they could avail themselves of this increased community spousal allocation. This letter is attached as Exhibit 1.

5. Petitioners never received Commissioner Celani's letter or any other oral or written notification from DSW of the new Medicaid provisions affecting community spouses.

6. As soon as he learned of this change in the law, Mr. [Petitioner] requested a recomputation of Mrs. [Petitioner]'s nursing home patient payment or Medicaid applied income payment, in order to provide a monthly allocation for his maintenance needs as a community spouse from October 1, 1989. Mr. [Petitioner]'s request was made in a letter dated May 10, 1990.

7. In response, DSW recomputed Mrs. [Petitioner]'s applied income and notified the petitioners of their entitlement to an allocation for the maintenance needs of the community spouse beginning with the month of May, 1990. The basis for petitioners' determination is DSW's policy to phase-in the MCCA provisions by making them effective for applicants as of October 1, 1989 and for recipients at the time of the next scheduled review of Medicaid eligibility.

8. Review of a nursing home resident's Medicaid eligibility occurs annually on the recipient's anniversary month or the month that the recipient first became eligible.

ORDER

The Department's decision not to grant the petitioners a community spouse maintenance allowance as of October 1, 1989, is reversed. The matter is remanded to the Department to determine the appropriate amount of this allowance based on the petitioners' income and expenses, and to adjust the petitioners' benefits accordingly.

REASONS

The issue in this case appears to be the validity of the Department's "policy" to "phase in" the amendments to the federal statute and regulations regarding a spousal maintenance deduction from the applied income of institutionalized Medicaid recipients. There is no question that these amendments were effective as of October 1, 1989.

Stipulation of Facts, paras. 1 and 4, supra.

Neither the statute (42 U.S.C. § 1396r-5), the federal regulations (42 C.F.R. § 435.832), nor the Department's own regulations (Medicaid Manual § M 413.21) makes any mention of a "phase in" of these provisions. The only support proffered by the Department for phasing in these provisions is a "policy bulletin" (No. 89-54F) it issued in November, 1989, that provides, in part:

Changes are effective for all applicants as of October 1, 1989. Changes are effective at the time of the next scheduled review of Medicaid eligibility for recipients.

The Department has provided no legal support or rationale in support of this policy. Thus, the hearing officer is at a complete loss to understand the basis of the Department's decision.

The "notice" sent by the Department to all Medicaid recipients in November, 1989 (see Exhibit 1) makes no mention of such a phase-in--in fact, it clearly states: "The effective date of these rules is October 1, 1989." Moreover, the "policy bulletin" cited by the Department (see

supra) does not rule out making the changes retroactively, effective on the date of review.

Inasmuch as it is "axiomatic" that agencies are required to follow the regulations they draft,¹ and there being no legal basis whatsoever, either proffered by the Department or known to the hearing officer, allowing states to delay implementation of federal laws² (or, worse, to implement the law for some, but not for others),³ the Department's decision is reversed. The matter is remanded to the Department to determine the petitioners' spousal allocation as of October 1, 1989, and to adjust, retroactively, the petitioners' benefits accordingly.

FOOTNOTES

¹Bishop v. Town of Barre, 140 VT 564 (1982).

²King v. Smith, 392 US 309 (1988); Lavigne v. Department of Social Welfare, 139 VT 114 (1980).

³U.S. Constitution, Amendment XIV.

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